

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0580

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 16, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective February 4, 2024 (decision # L0003606298). Claimant filed a timely request for hearing. On July 1, 2024, ALJ Chiller conducted a hearing, and on July 19, 2024, issued Order No. 24-UI-259614, reversing decision # L0003606298 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On August 7, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer submitted written arguments on August 7, 2024, and August 26, 2024. EAB did not consider the employer's August 7, 2024, written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Additionally, both of the employer's written arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's August 26, 2024, argument to the extent it was based on the record.

The employer also asserted that the hearing proceedings were unfair or the ALJ was biased. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Bottles and Cans, LLC employed claimant, most recently as an operations manager, from May 13, 2022, until February 5, 2024.

(2) The employer operated a wine and beer retail shop which included a patio with beverage service. As a manager, claimant was responsible for both managerial and administrative duties, as well as customer

service duties such as cashiering. While the latter required claimant to be onsite, the employer allowed claimant flexibility to complete her managerial and administrative duties offsite.

(3) The employer did not maintain a written attendance policy, but generally expected their employees to work as scheduled. Nevertheless, the employer granted claimant significant flexibility to make her own schedule with regard to her managerial and administrative duties.

(4) On February 4, 2024, claimant requested that the owner of the business meet with her to discuss concerns she had about her work and the business, including work performance issues that the owner had raised with her, and her own concerns about her rate of pay. Claimant and the owner had discussed these issues on prior occasions. Claimant had originally been scheduled to work from 4:00 p.m. until 6:00 p.m. that day. However, claimant started work early at 2:00 p.m. that day, and intended to work until 4:00 p.m. Claimant only planned to work on administrative duties that day, and had largely completed those duties by the time that she met with the owner.

(5) During the meeting, the owner “was shouting at” claimant, was “very red in the face... [and] very upset with” claimant, called claimant names, and “proceeded to cuss and threaten” claimant. Transcript at 25; Exhibit 7 at 6. As a result of the owner’s conduct during the meeting, claimant became upset and tearful and “felt that the conversation was going nowhere.” At approximately 5:30 p.m., after telling the owner that they “needed to stop talking for that time because [they] were both upset, and that [claimant] believed that [they] needed to come back to it at another point,” claimant left the meeting and went home. Transcript at 25. The owner took claimant’s abrupt departure to mean that she had quit, although claimant neither stated that she was quitting nor intended to quit.

(6) On February 5, 2024, claimant sent a text message to the owner regarding administrative tasks she had planned to do for the business that day. A short time later, the owner responded to claimant’s message by stating, among other things, that he took claimant’s departure during their meeting the prior day to mean that claimant had quit; that he thought it “was for the best” that she left; that he would immediately take over claimant’s shifts and duties; that claimant should return her keys to the store that day; and that he would schedule an exit interview at claimant’s request. Exhibit 7 at 6. Claimant responded, in relevant part, by stating that she “did not quit by walking away from” the meeting the prior day, and requested that the owner not “force [her] out.” Exhibit 7 at 6. Nevertheless, the employer did not allow claimant to return to work, suggesting that claimant was unhappy working for the employer and that it was therefore “time for [claimant] to move on.” Exhibit 7 at 7.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

Nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The parties disputed the nature of the work separation. The employer asserted at hearing he believed claimant to have quit because she left during their meeting on February 4, 2024. Transcript at 6. However, the employer also testified that claimant did not tell him she was quitting when she left the

meeting. Transcript at 7. Claimant testified that she did not say she was quitting during the meeting and instead informed the employer she intended to revisit the discussion again when the parties were calmer. The record does not show that claimant returned her keys or took any other actions evidencing that she was quitting when she left the meeting. The record shows, more likely than not, claimant did not quit when she left the meeting on February 4, 2024. Instead, the record shows employer discharged claimant during a series of text messages on February 5, 2024, by stating that it was best if claimant moved on, directed her to return her keys, and told her he would schedule an exit interview with her if she wished. *See Exhibit 7 at 6–8.*

Despite the employer’s assertions that claimant quit during the February 5, 2024, text exchange, the record shows that claimant wished to continue working for the employer, and intended to do so. This is evidenced by claimant’s repeated assertions that she did not quit and actions which indicated that she intended to continue working for the employer. However, the owner refused to allow claimant to continue working, as evidenced by his statements to her that she should move on, indicating he would take over claimant’s work duties, requesting claimant return employer’s keys, and offering an exit interview, all steps consistent with end-of-employment practices. Because claimant was willing to continue working for the employer for an additional period of time but the employer did not allow claimant to do so, the work separation was a discharge which occurred on February 5, 2024.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a). “[W]antonly negligent’ means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant on February 5, 2024, during a text exchange between claimant and the employer. Although the owner asserted, as noted above, his belief that claimant had quit, he also suggested, broadly, two separate reasons for discharging claimant. Based on the owner’s testimony, the record suggests that the employer’s primary reason for discharging claimant was because she left abruptly during their meeting on February 4, 2024. The owner echoed this sentiment in his written argument, stating, “As an employer I have the right to expect that my employees complete their scheduled shifts without walking off the job and not communicating with me.” Employer’s Written Argument at 1.

However, during the February 5, 2024, text exchange with claimant, the owner told claimant that he was “not interested in having a person working for [him] who has said that they don’t think their situation is fair and then just takes off without communicating.” Exhibit 7 at 8. During that exchange, the owner mentioned other similar concerns regarding complaints claimant had previously raised with him. This suggests that, in addition to discharging claimant for leaving the meeting on February 4, 2024, the employer also decided to discharge claimant, in part, because of her apparent dissatisfaction with her

pay or other aspects of her job. The employer did not meet their burden to show that either of these causes for discharge constituted misconduct.

As to claimant's abrupt departure from the February 4, 2024, meeting, claimant's decision to leave the meeting when she did was not a willful or wantonly negligent violation of the employer's standards of behavior. Although the employer did have the right to expect that an employee would complete their scheduled shift without "walking off the job and not communicating" about the departure, that is not an accurate description of the events that led to claimant's discharge.

Despite the employer's broad characterization of claimant as leaving without communicating, claimant testified at hearing that she and the owner "needed to stop talking for that time because [they] were both upset, and that [claimant] believed that [they] needed to come back to it at another point." Transcript at 25. The owner did not rebut this assertion. As such, the evidence on this point is, at best, equally balanced. Because the employer bears the burden of proof in a discharge case, the facts on that point have been found in accordance with claimant's testimony.

Additionally, the employer objected in their written argument to the order under review's characterization of the February 4, 2024, meeting as "contentious,"¹ stating that the owner "specifically denied and contested" this point in his testimony. Employer's Written Argument at 1. The record does not show, however, that the owner actually contested this in his testimony. To be clear, the word used to subjectively characterize the meeting is not at issue here. Rather, it is the overall tenor of the meeting, and the behavior of the parties involved, that matters. In particular, claimant explained in testimony, and in her text messages admitted as part of Exhibit 7, that the owner yelled at her, called her names, "cussed" at her, and threatened her during the meeting. The owner offered no rebuttal for this. Thus, the uncontested facts in the record show that the owner acted as claimant described.

In light of this, and claimant's emotional response to the owner's behavior during the meeting, it is more accurate to describe claimant's departure from the meeting as a response to a meeting which had become escalated and unprofessional. An employer does not have the right to expect an employee to subject themselves to such behavior. Therefore, claimant's decision to leave the meeting and remove herself from those circumstances was not a willful or wantonly negligent violation of the standards of behavior that an employer has the right to expect from an employee. To the extent that the employer discharged claimant for that reason, claimant was not discharged for misconduct.

Finally, to the extent that the employer discharged claimant for having raised concerns about the conditions of her employment, the employer also has not met their burden to show that this constituted misconduct. An employer does not have the right to expect that an employee, who feels that their employment conditions (including compensation) are unfair or inadequate, will refrain from raising those issues with the employer on occasion. Thus, claimant's having done so does not constitute a willful or wantonly negligent violation of the standards of behavior that an employer has the right to expect of an employee, and is not misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

¹ See Order No. 24-UI-259614 at 2.

DECISION: Order No. 24-UI-259614 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Serres, not participating.

DATE of Service: August 29, 2024

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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